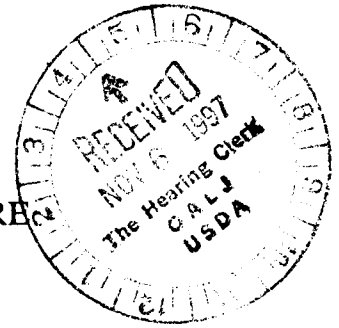


UNITED STATES DEPARTMENT OF AGRICULTURE  
BEFORE THE SECRETARY OF AGRICULTURE



In re: ) PACA Docket No. D-96-0530  
)  
Tolar Farms and/or )  
Tolar Sales, Inc., )  
)  
Respondents ) **Decision and Order**

The Acting Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. §§ 46.1-.48) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], by filing a Complaint on July 29, 1996.

The Complaint alleges, *inter alia*, that: (1) Tolar Farms, during the period July 1995 through September 1995, failed to make full payment promptly to three sellers of the agreed purchase prices in the total amount of \$66,696.06 for 19 lots of perishable agricultural commodities which Tolar Farms purchased, received, and accepted in interstate commerce (Compl. ¶ III); (2) Tolar Sales, Inc., during the period July 1995 through September 1995, failed to make full payment promptly to four sellers of the agreed purchase prices in the total amount of \$125,392.97 for 27 lots of perishable

agricultural commodities which Tolar Sales, Inc., purchased, received, and accepted in interstate commerce (Compl. ¶ V); and (3) by reason of the facts alleged in paragraphs III and V of the Complaint, Tolar Farms and/or Tolar Sales, Inc. [hereinafter Respondents], willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Compl. ¶ VI). Complainant requests: (1) a finding that Respondents willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)); (2) an order revoking Tolar Farms' PACA license; and (3) the publication of the facts and circumstances regarding Tolar Sales, Inc.'s willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Compl. ¶ VI(2)-(3)).

Respondents filed an Answer on September 17, 1996, denying that they violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) as alleged in paragraphs III and V of the Complaint (Answer ¶¶ 3, 5). Respondents state in their Answer, as an affirmative defense, that "TOLAR FARMS alleges accord and satisfaction as it has come to agreements in principle with all creditors listed on the Complaint to make full payment promptly. Respondent will deliver copies of the settlement agreements when available." (Answer ¶ 8.)

On July 10, 1997, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a Motion for Decision Without Hearing by Reason of Admissions [hereinafter Complainant's Motion for Default Decision] and a proposed Decision Without Hearing by Reason of Admissions [hereinafter Complainant's Proposed Default Decision]. Complainant asserts that "respondents never sent the

Department any settlement agreements" and states that "[p]urported partial payment agreements with unpaid sellers does [sic] not excuse the respondent's [sic] failure to make full payment promptly to its [sic] sellers." (Complainant's Motion for Default Decision at 2.) Moreover, Complainant attached to Complainant's Motion for Default Decision copies of promissory notes which Complainant asserts "constitute evidence that of the amount alleged in the complaint as owing, \$192,089.03, at least \$142,052.37 remains unpaid" (Complainant's Motion for Default Decision at 4 and Exhibit B).

Respondents did not file objections to Complainant's Motion for Default Decision within the time provided in section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), and on September 4, 1997, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Administrative Law Judge James W. Hunt [hereinafter ALJ] issued a Decision Without Hearing By Reason of Admissions [hereinafter Default Decision], in which the ALJ: (1) found that Respondents' Answer, in conjunction with the promissory notes attached to Complainant's Motion for Default Decision, constitutes an admission of all the material allegations of fact contained in the Complaint (Default Decision at 2); (2) found that during the period July 1995 through September 1995, Respondents failed to make full payment promptly to seven sellers of the agreed purchase prices in the total amount of \$192,089.03 for 46 lots of perishable agricultural commodities which Respondents purchased, received, and accepted in interstate commerce and that, as of May 20, 1997, at least \$142,052.37 of the amount alleged in the Complaint remained past due and unpaid (Default Decision at 3); (3) concluded that Respondents committed willful, flagrant, and repeated violations of section 2 of the PACA (7 U.S.C. § 499b)

(Default Decision at 3); and (4) ordered the facts and circumstances set forth in the Default Decision be published (Default Decision at 3).

On October 1, 1997, Respondent appealed to the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).<sup>1</sup> On November 3, 1997, Complainant filed Objection to Respondents' Appeal Petition [hereinafter Complainant's Response], and the case was referred to the Judicial Officer for decision.

Based upon a careful consideration of the record in this proceeding, I have adopted the Default Decision as the final Decision and Order. Additions or changes to the Default Decision are shown by brackets, deletions are shown by dots, and minor editorial changes are not specified. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

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<sup>1</sup>The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g); section 4(a) of Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219, 3221 (1953), *reprinted in* 5 U.S.C. app. § 4(a) at 1491 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. § 6912(a)(1)).

## PERTINENT STATUTORY PROVISIONS AND REGULATIONS

7 U.S.C.:

### CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

....

#### **§ 499b. Unfair conduct**

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce—

....

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 499e(c) of this title[.]

#### **§ 499h. Grounds for suspension or revocation of license**

##### **(a) Authority of Secretary**

Whenever (1) the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title, . . . the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

7 U.S.C. §§ 499b(4), 499h(a).

7 C.F.R.:

**SUBCHAPTER B—MARKETING OF PERISHABLE  
AGRICULTURAL COMMODITIES**

**PART 46—REGULATIONS (OTHER THAN RULES OF PRACTICE) UNDER THE  
PERISHABLE AGRICULTURAL COMMODITIES ACT**

DEFINITIONS

. . . . .

**§ 46.2 Definitions.**

The terms defined in the first section of the Act shall have the same meaning as stated therein. Unless otherwise defined, the following terms whether used in the regulations, in the Act, or in the trade shall be construed as follows:

. . . . .

(aa) *Full payment promptly* is the term used in the Act in specifying the period of time for making payment without committing a violation of the Act. "Full payment promptly," for the purpose of determining violations of the Act, means:

. . . . .

(5) Payment for produce purchased by a buyer, within 10 days after the day on which the produce is accepted;

. . . . .

(11) Parties who elect to use different times of payment than those set forth in paragraphs (aa)(1) through (10) of this section must reduce their agreement to writing before entering into the transaction and maintain a copy of the agreement in their records. If they have so agreed, then payment within the agreed upon time shall constitute "full payment promptly": *Provided*, That the party claiming the existence of such an agreement for time of payment shall have the burden of proving it.

7 C.F.R. § 46.2(aa)(5), (11).

**ADMINISTRATIVE LAW JUDGE'S DECISION WITHOUT HEARING  
BY REASON OF ADMISSIONS (AS MODIFIED)**

**Preliminary Statement**

. . . .

On September 17, 1996, Respondents filed an Answer and generally denied that sellers were owed for [perishable agricultural commodities] as alleged in the Complaint. Respondents made an affirmative defense that the debts of Tolar Farms had been satisfied by accord and satisfaction because Tolar Farms had come to agreement in principle with all creditors listed on the Complaint to make full payment promptly. While Respondents never [filed] copies of their settlement agreements, [Complainant filed] copies of promissory notes . . . that show Respondents still owe at least \$142,052.37 to four of the seven sellers [identified in the Complaint as produce sellers who Respondents failed to pay in accordance with section 2(4) of the PACA (7 U.S.C. § 499b(4))]. Respondents' Answer, in conjunction with their promissory notes, constitutes an admission of all the material allegations of fact contained in the Complaint pursuant to section 1.136 of the Rules of Practice (7 C.F.R. § 1.136). Complainant moved for the issuance of a Decision pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). Therefore, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

### **Findings of Fact**

1. Tolar Farms is a partnership composed of Robert M. Tolar and Tony L. Tolar. Tolar Farms' business address is 2659 Case Road, Labelle, Florida 33935. Tolar Farms' mailing address is P.O. Box 191, Labelle, Florida 33935.

2. Pursuant to the licensing provisions of the [PACA], license number 921639 [was] issued to [Tolar Farms] on August 14, 1992. This license was renewed annually, but terminated on August 14, 1996, pursuant to section 4(a) of the [PACA] (7 U.S.C. § 499d(a)) when [Tolar Farms] failed to pay the required annual license fee.

3. Tolar Sales, Inc., is a corporation organized and existing under the laws of the State of Florida. Tolar Sales, Inc.'s business mailing address is P.O. Box 191, LaBelle, Florida 33935.

4. At all times material [to this proceeding], Tolar Sales, Inc., operated subject to the PACA without holding a PACA license.

5. As more fully set forth in paragraphs III and V of the Complaint, Tolar Farms and Tolar Sales, Inc., during the period July through September 1995, failed to make full payment promptly to seven sellers of the agreed purchase prices for 46 [lots of perishable agricultural commodities] in the total amount of \$192,089.03. As of May 20, 1997, at least \$142,052.37 remained past due and unpaid.

### **Conclusions**

Respondents' failures to make full payment promptly with respect to the 46 transactions [referenced] in Finding of Fact No. 5 [in this Decision and Order] constitute



willful, repeated, and flagrant violations of section 2[(4)] of the [PACA] (7 U.S.C. § 499b[(4)]). . . .

. . . .

### **ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER**

The Default Decision was served on Respondents by certified mail on September 11, 1997 (Return Receipt for Article Number P 093 033 725). In accordance with section 1.145(a) of the Rules of Practice (7 C.F.R. § 1.145(a)), Respondents had 30 days after receiving service of the Default Decision within which to appeal the Default Decision to the Judicial Officer as follows:

#### **§ 1.145 Appeal to Judicial Officer.**

(a) *Filing of petition.* Within 30 days after receiving service of the Judge's decision, a party who disagrees with the decision, or any part thereof, or any ruling by the Judge or any alleged deprivation of rights, may appeal such decision to the Judicial Officer by filing an appeal with the Hearing Clerk.

7 C.F.R. § 1.145(a).

Further, the Default Decision served on Respondents on September 11, 1997, provides that Respondents have 30 days after service of the Default Decision on Respondents within which to file an appeal as follows:

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings thirty-five days after service hereof, unless appealed to the Secretary by a party to the proceeding within thirty days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Default Decision at 3-4.

Moreover, a letter dated September 4, 1997, from the Office of the Hearing Clerk to Respondents which accompanied the Default Decision specifically informs Respondents that "[e]ach party has thirty (30) days from the service of this decision and order in which to file an appeal to the Department's Judicial Officer."

On October 1, 1997, Respondents filed a letter [hereinafter Respondents' Appeal Petition] which states in its entirety as follows:

September 26, 1997

Ms. Joyce A. Dawson  
Hearing Clerk  
U.S. Dept. of Agriculture  
Room 1081  
South Building  
1400 Independence Ave., SW  
Washington, DC 20250-9200

Dear Ms. Dawson;

Subject: PACA Docket No. D-96-0530

We are appealing [sic] this decision on the grounds that we have the paperwork dismissing all PACA filings against us.

The appropriate documents will follow.

Sincerely,

Tony Tolar  
Partner  
/s/

Robert Tolar  
Partner  
/s/

The time for Respondents' filing an appeal petition ended October 14, 1997, and Respondents did not supplement Respondents' Appeal Petition with the "paperwork

dismissing all PACA filings" or "appropriate documents" referenced in Respondents' Appeal Petition or any other document within the time for filing their appeal petition.

On November 3, 1997, Complainant filed Complainant's Response requesting the dismissal of Respondents' Appeal Petition on the ground that Respondents have not raised any issues or arguments (Complainant's Response at 2). Section 1.145(a) of the Rules of Practice addresses the content of appeal petitions as follows:

**§ 1.145 Appeal to Judicial Officer.**

(a) *Filing of petition.* . . . As provided in § 1.41(h)(2), objections regarding evidence or a limitation regarding examination or cross-examination or other ruling made before the Judge may be relied upon in an appeal. Each issue set forth in the petition, and the arguments thereon, shall be separately numbered; shall be plainly and concisely stated; and shall contain detailed citations of the record, statutes, regulations or authorities being relied upon in support thereof. A brief may be filed in support of the appeal simultaneously with the petition.

7 C.F.R. § 1.145(a).

I agree with Complainant that Respondents have not raised any issues or arguments in Respondents' Appeal Petition, and even if Respondents' Appeal Petition could be construed as raising issues or arguments, Respondents' Appeal Petition does not provide a basis for setting aside the Default Decision.

Respondents were served with a copy of the Complaint and a copy of the Rules of Practice in this proceeding on August 8, 1996 (Return Receipt for Article Number Z 068 837 997). In their Answer, Respondents assert, as an affirmative defense, that "TOLAR FARMS alleges accord and satisfaction as it has come to agreements in principle with all creditors listed on the Complaint to make full payment promptly. Respondent will deliver copies of the settlement agreements when available." (Answer ¶ 8.)

Section 1.139 of the Rules of Practice provides:

**§ 1.139 Procedure upon failure to file an answer or admission of facts.**

The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk. Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing.

7 C.F.R. § 1.139.

On July 10, 1997, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed Complainant's Motion for Default Decision and Complainant's Proposed Default Decision. Attached to Complainant's Motion for Default Decision are copies of promissory notes which clearly establish that, of the amount Respondents are alleged in the Complaint to owe to sellers of perishable agricultural commodities, as of May 20, 1997, at least \$142,052.37 remained unpaid to four of the seven sellers identified in the Complaint as produce sellers who Respondents failed to pay in accordance with section 2(4) of the PACA (7 U.S.C. § 499b(4)).

A copy of Complainant's Motion for Default Decision, Complainant's Proposed Default Decision, and a letter dated July 11, 1997, from the Office of the Hearing Clerk, were served on Respondents by certified mail on August 5, 1997 (Return Receipt for Article Number P 093 033 690). The July 11, 1997, letter from the Office of the Hearing Clerk states as follows:

**CERTIFIED RECEIPT REQUESTED**

July 11, 1997

Mr. Luis A. Espino  
Mishan, Sloto & Greenberg  
Attorneys at Law  
First Union Financial Center  
Suite 2350  
200 South Biscayne Boulevard  
Miami, Florida 33131-2328

Dear Mr. Espino:

**Subject:     In re: Tolar Farms and/or Tolar Sales, Inc., Respondents -  
                  PACA Docket No. D-96-0530**

Enclosed is a copy of Complainant's Motion for Decision Without Hearing by Reason of Admissions, together with a copy of the Decision Without Hearing by Reason of Admissions, which have been filed with this office in the above-captioned proceeding.

In accordance with the applicable Rules of Practice, you will have 20 days from the receipt of this letter in which to file with this office an original and three copies of objections to the Proposed Decision.

Respondents had ample opportunity during this 20-day period to file objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision. Respondents failed to file objections to Complainant's Motion for Default Decision or Complainant's Proposed Default Decision within 20 days, as provided in 7 C.F.R. § 1.139, and on September 4, 1997, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the ALJ issued a Default Decision in which, *inter alia*, the ALJ found that Respondents' Answer, in conjunction with the promissory notes attached to Complainant's Motion for Default Decision, constitutes an admission of all the material allegations of fact contained in the Complaint (Default Decision at 2).

While Respondents did not file any documents referenced in paragraph 8 of their Answer or in Respondents' Appeal Petition, Complainant filed documents that Complainant received from Respondents after October 14, 1997 (Complainant's Response at 2, Attach. A). One of these documents establishes that a Complaint in a reparation proceeding instituted against Tolar Farms under the PACA was dismissed. *Classie Sales Corp. v. Tolar Farms*, PACA Docket No. R-96-140 (Sept. 11, 1996) (Dismissal Order Based on Election of Remedies). Further, Complainant filed additional documents which Complainant asserts that Complainant "has located" (Complainant's Response at 3, Attach. B). One of these documents establishes that a second reparation proceeding instituted against Tolar Farms under the PACA was dismissed. *Larry D. Ellerman v. Robert M. Tolar and Tony L. Tolar, d/b/a Tolar Farms*, PACA Docket No. R-96-149 (Dec. 16, 1996) (Order of Dismissal). However, dismissal of reparation proceedings instituted against Tolar Farms by private parties has no bearing on the instant disciplinary proceeding instituted by Complainant against Respondents. The record contains no evidence that the instant disciplinary proceeding was ever dismissed.

Further, Complainant filed six documents entitled "Acknowledgment of Settlement" that Complainant received from Respondents after October 14, 1997 (Complainant's Response at 2, Attach. A) and one document entitled "Acknowledgment of Settlement" that Complainant "has located" (Complainant's Response at 3, Attach. B).

Each of the documents entitled "Acknowledgment of Settlement" is a private agreement between Respondents and one of their produce sellers which states that the seller "will receive payment in full for the debt due it from the Tolars." All of the documents entitled "Acknowledgment of Settlement" were executed in October 1996 and December 1996, well after the instant disciplinary proceeding was instituted. "Full payment promptly" is defined as "[p]ayment for produce purchased by a buyer, within 10 days after the day on which the produce is accepted" (7 C.F.R. § 46.2(aa)(5)) and parties who elect to use different times of payment "must reduce their agreement to writing before entering into the transaction" (7 C.F.R. § 46.2(aa)(11)). The documents entitled "Acknowledgment of Settlement," which were executed well after Respondents entered into the transactions, which are the subject of the Complaint in this proceeding, do not satisfy the requirement under the PACA that commission merchants, dealers, and brokers make full payment promptly for perishable agricultural commodities purchased, received, and accepted in interstate or foreign commerce. Respondents' promises of future payment of debt, which were made long after the transactions for the purchase of perishable agricultural commodities and which are the subject of this proceeding, do not constitute full payment promptly in accordance with section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Although on rare occasions default decisions have been set aside for good cause shown or where Complainant did not object,<sup>2</sup> Respondents have shown no basis for

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<sup>2</sup>*In re Arizona Livestock Auction, Inc.*, 55 Agric. Dec. 1121 (1996) (default decision set aside because facts alleged in the Complaint and deemed admitted by failure to answer were not sufficient to find a violation of the Packers and Stockyards Act or jurisdiction (continued...))

setting aside the Default Decision. In view of Respondents' Answer and Respondents' promissory notes attached to Complainant's Motion for Default Decision, there is no material issue of fact that warrants holding a hearing.<sup>3</sup> Moreover it is not necessary to show that the undisputed facts prove all the allegations in the Complaint.<sup>4</sup> The same order would be issued in this case unless the proven violations are *de minimis*.<sup>5</sup>

Respondents' violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) are repeated, flagrant, and willful, as a matter of law. Respondents' violations are "repeated"

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<sup>2</sup>(...continued)

over the matter by the Secretary of Agriculture); *In re Veg-Pro Distributors*, 42 Agric. Dec. 273 (1983) (remand order), *final decision*, 42 Agric. Dec. 1173 (1983) (default decision set aside because service of the Complaint by registered and regular mail was returned as undeliverable, and Respondent's license under the Perishable Agricultural Commodities Act had lapsed before service was attempted); *In re J. Fleishman & Co.*, 38 Agric. Dec. 789 (1978) (remand order), *final decision*, 37 Agric. Dec. 1175 (1978); *In re Henry Christ*, L.A.W.A. Docket No. 24 (Nov. 12, 1974) (remand order), *final decision*, 35 Agric. Dec. 195 (1976); and *see In re Vaughn Gallop*, 40 Agric. Dec. 217 (order vacating default decision and case remanded to determine whether just cause exists for permitting late Answer), *final decision*, 40 Agric. Dec. 1254 (1981).

<sup>3</sup>*See In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 894 (1997) (stating that in view of respondent's admissions in the documents it filed in a bankruptcy proceeding, there is no material issue of fact that warrants holding a hearing); *In re Potato Sales Co.*, 54 Agric. Dec. 1409, 1413 (1995) (stating that the Chief ALJ correctly held that a hearing was not required where the record, including respondent's bankruptcy documents, shows that respondent has failed to make full payment exceeding a *de minimis* amount), *appeal dismissed*, No. 95-70906 (9th Cir. Nov. 8, 1996).

<sup>4</sup>The Complaint alleges that Respondents failed to make full payment promptly to seven sellers of the agreed purchase prices for 46 lots of perishable agricultural commodities in the total amount of \$192,089.03, which Respondents purchased, received, and accepted in interstate commerce (Compl. ¶¶ III, V). Respondents' promissory notes establish that Respondents owe four of the sellers identified in the Complaint \$142,052.37.

<sup>5</sup>*In re Five Star Food Distributors Inc.*, 56 Agric. Dec. 880, 894-95 (1997); *In re Tri-State Fruit & Vegetable, Inc.*, 46 Agric. Dec. 81 (1984) (Ruling on Certified Question); *In re Fava & Co.*, 46 Agric. Dec. 79 (1984) (Ruling on Certified Question).



because repeated means more than one, and Respondents' violations are flagrant because of the number of violations, the amount of money involved, and the time period during which the violations occurred.<sup>6</sup>

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<sup>6</sup>See, e.g., *Farley & Calfee v. United States Dep't of Agric.*, 941 F.2d 964, 968 (9th Cir. 1991) (holding that 51 violations of the payment provisions of the PACA falls plainly within the permissible definition of *repeated*); *Melvin Beene Produce Co. v. Agricultural Marketing Service*, 728 F.2d 347, 351 (6th Cir. 1984) (holding 227 transactions occurring over a 14-month period to be repeated and flagrant violations of the PACA); *Wayne Cusimano, Inc. v. Block*, 692 F.2d 1025, 1029 (5th Cir. 1982) (holding 150 transactions occurring over a 15-month period involving over \$135,000 to be frequent and flagrant violations of the payment provisions of the PACA); *Reese Sales Co. v. Hardin*, 458 F.2d 183, 187 (9th Cir. 1972) (finding 26 violations of the payment provisions of the PACA involving \$19,059.08 occurring over 2½ months to be repeated and flagrant); *Zwick v. Freeman*, 373 F.2d 110, 115 (2d Cir.) (concluding that because the 295 violations of the payment provisions of the PACA did not occur simultaneously, they must be considered "repeated" violations within the context of the PACA and finding the 295 violations to be "flagrant" violations of the PACA in that they occurred over several months and involved more than \$250,000), *cert. denied*, 389 U.S. 835 (1967); *In re Kanowitz Fruit & Produce, Co., Inc.*, 56 Agric. Dec. 917 (1997) (concluding that respondent's failure to pay 18 sellers \$206,850.69 for 62 lots of perishable agricultural commodities during the period of March 1993 through December 1993, constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4)), *appeal docketed*, No. 97-4224 (2d Cir. Aug. 1, 1997); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880 (1997) (concluding that respondent's failure to pay 14 sellers \$238,374.08 for 174 lots of perishable agricultural commodities during the period of May 1994 through March 1995, constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4)); *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234 (1996) (concluding that respondent Havana Potatoes of New York Corporation's failure to pay 66 sellers \$1,960,958.74 for 345 lots of perishable agricultural commodities during the period of February 1993 through January 1994, constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4) and respondent Havpo, Inc.'s failure to pay six sellers \$101,577.50 for 23 lots of perishable agricultural commodities during the period of August 1993 through January 1994, constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4)), *appeal docketed*, No. 97-4053 (2d Cir. Apr. 2, 1997); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1204 (1996) (concluding that Respondent Andershock Fruitland, Inc.'s failure to pay 11 sellers \$245,873.41 for 113 lots of perishable agricultural commodities during the period of May 1994 through May 1995, constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4)), *appeal docketed*, No. 96-4238 (7th Cir. Dec. 30, 1996).

A violation is willful under the Administrative Procedure Act (5 U.S.C. § 558(c)) if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements.<sup>7</sup> Since Respondents violated express requirements of the PACA by failing to make full payment for perishable agricultural commodities

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<sup>7</sup>See, e.g., *Toney v. Glickman*, 101 F.3d 1236, 1241 (8th Cir. 1996); *Cox v. USDA*, 925 F.2d 1102, 1105 (8th Cir. 1991), *cert. denied*, 502 U.S. 860 (1991); *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 777-78 (D.C. Cir. 1983); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (*per curiam*), *cert. denied*, 450 U.S. 997 (1981); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 994 (2d Cir.) *cert. denied*, 419 U.S. 830 (1974); *Goodman v. Benson*, 286 F.2d 896, 900 (7th Cir. 1961); *Eastern Produce Co. v. Benson*, 278 F.2d 606, 609 (3d Cir. 1960); *In re Kanowitz Fruit & Produce, Co., Inc.*, 56 Agric. Dec. 917, 925 (1997), *appeal docketed*, No. 97-4224 (2d Cir. Aug. 1, 1997); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 895-96 (1997); *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234, 1244 (1996), *appeal docketed*, No. 97-4053 (2d Cir. Apr. 2, 1997); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1204, 1232-33 (1996), *appeal docketed*, No. 96-4238 (7th Cir. Dec. 30, 1996); *In re Hogan Distrib., Inc.*, 55 Agric. Dec. 622, 626 (1996); *In re Moreno Bros.*, 54 Agric. Dec. 1425, 1432 (1995); *In re Granoff's Wholesale Fruit & Produce, Inc.*, 54 Agric. Dec. 1375, 1378 (1995); *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1330 (1995), *aff'd*, 104 F.3d 139 (8th Cir. 1997); *In re National Produce Co.*, 53 Agric. Dec. 1622, 1625 (1994); *In re Samuel S. Napolitano Produce, Inc.*, 52 Agric. Dec. 1607, 1612 (1993). See also *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 n.5 (1973) ("‘Willfully’ could refer to either intentional conduct or conduct that was merely careless or negligent."); *United States v. Illinois Central R.R.*, 303 U.S. 239, 242-43 (1938) ("In statutes denouncing offenses involving turpitude, ‘willfully’ is generally used to mean with evil purpose, criminal intent or the like. But in those denouncing acts not in themselves wrong, the word is often used without any such implication. Our opinion in *United States v. Murdock*, 290 U.S. 389, 394, shows that it often denotes that which is ‘intentional, or knowing, or voluntary, as distinguished from accidental,’ and that it is employed to characterize ‘conduct marked by careless disregard whether or not one has the right so to act.’")

The United States Court of Appeals for the Fourth Circuit and the United States Court of Appeals for the Tenth Circuit define the word "willfulness," as that word is used in 5 U.S.C. § 558(c), as an intentional misdeed or such gross neglect of a known duty as to be the equivalent of an intentional misdeed. *Capital Produce Co. v. United States*, 930 F.2d 1077, 1079 (4th Cir. 1991); *Hutto Stockyard, Inc. v. USDA*, 903 F.2d 299, 304 (4th Cir. 1990); *Capitol Packing Co. v. United States*, 350 F.2d 67, 78-79 (10th Cir. 1965). Even under this more stringent definition, Respondents' violations were willful.

promptly, the ALJ's finding of willfulness is correct.<sup>8</sup> However, willfulness is not a prerequisite to the publication of facts and circumstances of violations of 7 U.S.C. § 499b or the applicability of restrictions on employment provided in 7 U.S.C. § 499h(b). Nonetheless, the record supports a finding that Respondents' violations of 7 U.S.C. § 499b(4) were willful.

Respondents failed to make full payment promptly to seven sellers of the agreed purchase prices in the total amount of \$192,089.03 for 46 lots of perishable agricultural commodities which Respondents had purchased, received, and accepted in interstate commerce. These failures to pay took place over the period July 1995 through September 1995, a period of 3 months.

Willfulness is reflected in the length of time during which the violations occurred and the number and amount of violative transactions involved. Respondents knew or should have known that they could not make prompt payment for the large amount of perishable agricultural commodities they ordered. Nonetheless, Respondents continued over a 3-month period to make purchases knowing they could not pay for the produce as the bills came due. Respondents should have made sure that they had sufficient capitalization with which to operate. They did not, and consequently could not pay their suppliers of perishable agricultural commodities. Respondents deliberately shifted the

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<sup>8</sup>See *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 781-82 (D.C. Cir. 1983); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 895 (1997); *In re Hogan Distrib., Inc.*, 55 Agric. Dec. 622, 629 (1996); *In re Granoff's Wholesale Fruit & Produce, Inc.*, 54 Agric. Dec. 1375, 1378 (1995); *In re National Produce Co.*, 53 Agric. Dec. 1622, 1625 (1994); *In re Samuel S. Napolitano Produce, Inc.*, 52 Agric. Dec. 1607, 1612 (1993); *In re The Caito Produce Co.*, 48 Agric. Dec. 602, 643-53 (1989).

risk of nonpayment to sellers of the perishable agricultural commodities. Under these circumstances, Respondents have both intentionally violated the PACA and operated in careless disregard of the payment requirements in section 2(4) of the PACA (7 U.S.C. § 499b(4)), and Respondents' violations are, therefore, willful.<sup>9</sup>

Accordingly, the Default Decision was properly issued in this proceeding.

Application of the default provisions of the Rules of Practice does not deprive Respondents of their rights under the due process clause of the Fifth Amendment to the United States Constitution. *See United States v. Hulings*, 484 F. Supp. 562, 568-69 (D. Kan. 1980). There is no basis for allowing Respondents to present matters by way of defense at this time.

For the foregoing reasons, the following Order should be issued.

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<sup>9</sup>*In re Hogan Distrib., Inc.*, 55 Agric. Dec. 622, 630 (1996); *In re The Norinsberg Corp.*, 52 Agric. Dec. 1617, 1622 (1993), *aff'd*, 47 F.3d 1224 (D.C. Cir.), *cert. denied*, 116 S.Ct. 474 (1995); *In re Kornblum & Co.*, 52 Agric. Dec. 1571, 1573-74 (1993); *In re Full Sail Produce, Inc.*, 52 Agric. Dec. 608, 622 (1993); *In re Vic Bernacchi & Sons, Inc.*, 51 Agric. Dec. 1425, 1429 (1992); *In re Atlantic Produce Co.*, 35 Agric. Dec. 1631, 1641 (1976), *aff'd per curiam*, 568 F.2d 772 (4th Cir.) (Table), *cert. denied*, 439 U.S. 819 (1978).

**Order**

Respondents have committed willful, repeated, and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), and the facts and circumstances set forth in this Decision and Order shall be published, effective 65 days after service of this Order on Respondents.

Done at Washington, D.C.

November 6, 1997

A handwritten signature in cursive script, reading "William G. Jenson", is written over a horizontal line.

William G. Jenson  
Judicial Officer